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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1438

ASSOCIATED ELECTRIC COOPERATIVE, INC., *Petitioner,*

v.

ROGERS C. B. MORTON, individually and as SECRETARY OF THE INTERIOR, and PETER C. KING, individually and as ADMINISTRATOR OF THE SOUTHWESTERN POWER ADMINISTRATION, UNITED STATES OF AMERICA, *Intervening Defendant*, JOHN N. NASSIKAS, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement 5

Reasons for Allowance of the Writ 15

I. The unprecedented decision below, finding authority in the Secretary to unilaterally reduce, without compensation, the government's contractual obligations to pay for the "wheeling" of its power over transmission lines owned by others, is without statutory jusification, and, unless reversed, will make hazardous the continued utilization of this congressionally directed alternative to construction of transmission lines at federal expense. 15

II. A dangerous and fallacious precedent is set by the holding that the Secretary of the Interior may reverse a congressional policy decision, imposing detailed conditions on the expenditure of appropriated funds. These conditions required the Secretary to effectuate the congressional "postage stamp rate" policy by including in his power contracts specific provisions which he would now abrogate. 18

III. The decision below denies that the Secretary of the Interior and the Federal Power Commission are under a constitutional duty to afford due process to parties to government contracts whose rights they would reduce or cancel. If due process is required in such cases, to any degree, the

Page

decision of the court of appeals must be reversed, because the Secretary and the Commission did not grant any at all, and denied their responsibility to do so. 23

Conclusion 25

Attachment "A"

Appendix (Bound separately)

CITATIONS

STATUTES:

Bonneville Project Act, 16 U.S.C.A. 838g 6, 24
Continuing Fund Statute, 16 U.S.C. 825s-1 .....2, 4, 5, 6, 7
Flood Control Act of 1944, 16 U.S.C. 825s 2, 3, 4, 6, 12, 14, 21, 22, 24
Fort Peck Act, 16 U.S.C. 833 *et seq.* 6, 24
The Keating Amendment, 65 Stat. 255 7
Public Works Appropriations Act for F.Y. 1964, P.L. 88-251, U.S. Code Cong. & Ad. News 591 (1963) .. 11
Reclamation Project Act of 1939, 43 U.S.C. 485h(c) ...6, 24

COURT CASES:

Associated Electric Cooperative v. *Morton, et al.*, 507 F.2d 1167 (D.C. Cir. 1974) 1, 15
Brooks v. *Dewar*, 313 U.S. 354 (1941) 20
Burke v. *Southern Pac. R.R. Co.*, 234 U.S. 669, 679-80 (1914) 23
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 24
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 24
FPC v. *Texaco*, 417 U.S. 380 (1974) 24
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275, 293 (1958) 20

Page

Kansas City Power & Light Co. v. *McKay, et al.*, 115 F.Supp. 402 (1953), *vacated for lack of standing*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955) 18
Lynch v. *United States*, 292 U.S. 571 (1934) 23
Northern California Power Agency, et al. v. *Morton, et al.*, C.A. No. 74-617 (D.D.C. Feb. 14, 1975) 24
United States v. *Northern Pac. Ry. Co.*, 256 U.S. 51 (1921) 23
United States Dep't of the Interior, Bonneville Power Administration, Docket No. E-8978, — F.P.C. — (Dec. 19, 1974) 24

MISCELLANEOUS:

95 CONG. REC. 12023-36 (1949) 7, 8
96 CONG. REC. 17095-17100 (1959) 7
97 CONG. REC. 7864-68; 10207-10 (1951) 8
Hearings of the House Comm. on Appropriations on Public Works Appropriations for F. Y. 1964, 88th Cong., 1st Sess., pt. 3 at 699-700 (1963) 11
Hearings on Public Works Appropriations for 1961 Before the Subcomm. on Appropriations, 86th Cong., 2d Sess., pt. 2 at 577 (1960) 17
Hearings on Public Works Appropriations for F.Y. 1963 Before a Subcomm. of the House Comm. on Appropriations, 87th Cong., 2d Sess., pt. 3 at 815 (1962) 9, 11
Hearings on the Interior Dep't Appropriations Bill for 1964 Before a Subcomm. of the Senate Comm. on Appropriations, 88th Cong., 1st Sess., at 143 (1963) 11
H.R. REP. No. 747, 84th Cong., 1st Sess. 5-6 (1955) ... 18
H.R. REP. No. 1085, 84th Cong., 1st Sess. (1955) 19
H.R. REP. No. 93-1375, 93d Cong., 2d Sess. 4 (1974), 1974 U.S. CODE CONG. & AD. NEWS 5813 7
Potamkin, *Public Power and the Federal Government*, 30 NEB. L. REV. 375, 384-89 (1951) 7

	Page
S. Doc. No. 21, 75th Cong., 1st Sess. 2-4 (1937)	19
S. Rep. No. 1672, 89th Cong., 2d Sess. 39-40 (1966) ...7,	11
1973 Southeastern Power Administration Ann. Rep. 1, 8-10	6
1974 Southwestern Power Administration Ann. Rep. 2, 19	6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Associated Electric Cooperative, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 507 F.2d 1167 (D.C. Cir. 1974). The order of the United States District Court for the District of Columbia, granting petitioner's motion for summary

judgment, is unreported and appears in the Appendix at 23a. The principal orders of the Federal Power Commission (App. 25a-33a) are reported at 43 F.P.C. 804 (1970).

JURISDICTION

The judgment of the court of appeals (App. 1a) was entered on November 18, 1974. A timely petition for rehearing was denied on December 16, 1974 (App. 22a). On March 12, 1975, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including May 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This case brings before the Supreme Court for the first time the extent of the authority of the Secretary of the Interior under Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which controls the sale and transmission of all power generated at dams under the control of the Secretary of the Army.

Three issues of construction of that Act, and its supplement, the Continuing Fund Statute, 16 U.S.C. 825s-1, are involved:

1. Whether the statutory authority of the Secretary of the Interior to revise the rates at which the United States sells electricity includes authority to unilaterally reduce the compensation that the United States has contracted to pay for use of transmission lines of another, in lieu of constructing its own lines.

2. Whether the Secretary of the Interior has statutory authority to reverse, by administrative action, the

decision of the Congress that electricity generated at federal hydroelectric power plants should be transmitted and sold at uniform "postage stamp rates" to all consumers receiving similar classes of service regardless of whether the power is transmitted to them (1) over lines constructed by the United States, or (2) over lines the use of which has been acquired by the United States under rental or "wheeling" agreements.

3. As for due process, the issues are:

(a) The extent to which the Secretary of the Interior, in the exercise of asserted authority to unilaterally change the terms of a contract, is obliged to afford due process to parties to such contracts.

(b) The extent to which the Federal Power Commission, in the exercise of asserted authority to review such action by the Secretary, is obliged to afford due process to parties to a contract thus unilaterally altered.

(c) If the action of the Secretary in this case is deemed to be "ratemaking," the extent of due process required.

STATUTES INVOLVED

Section 5 of the Flood Control Act of 1944, 16 U.S.C 825s, provides:

> "Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effec-

tive upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts."

The Continuing Fund Statute, 16 U.S.C. 825s-1, provides:

> "All receipts from the transmission and sale of electric power and energy under the provisions of section 825s of this title, generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund established; and said fund

> of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies: *Provided,* That expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts as may be approved annually in appropriation Acts."

STATEMENT

This suit would enjoin the Secretary of the Interior from extinguishing his admitted contractual obligation [1] to pay $2,647,100 annually for the use of certain transmission lines, by the device of superimposing,

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[1] The obligation, stated in a 1962 contract between Southwestern Power Administration (SPA) and the Petitioner (Art. V, Sec. 1(e), Ex. P-8, R. Vol. II, 196-97):

> "(e) It is anticipated by the parties hereto that by June 1, 1997, all loans made to the Federated Cooperatives by the Rural Electrification Administration and utilized by the Federated Cooperatives to construct the 'Associated 161 Kv System' set forth in Exhibit '2' will be fully repaid, it being the intention of the parties hereto that the annual credit to Associated shall continue to be made in amounts computed under Subsection (a) and (b) of this Section 1, until such REA loans have been fully repaid."

The defendants' admission (para. 20(2), R. Vol. I, 70-71):

> "They admit that subsection 1(e) of Article V of the SPA-Associated contract states that it is the intention of the parties that the annual credit to plaintiff in the full amount stated in the contract shall continue to be made until termination of the contract. . . ."

unilaterally, a "transmission service charge" in precisely the same amount, $2,647,100 annually, upon his sales of electricity to the rural electric cooperatives which own these lines. No such charge, in any amount, would be imposed upon the utilities or federal agencies which receive government power over these lines. The Secretary asserts that he is authorized by Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, to do this.

The Secretary of the Interior receives from the Secretary of the Army electricity generated at reservoirs under the latter's control, and transmits and sells this to public bodies, cooperatives, private companies, and, in some cases, federal installations.[2]

Section 5 authorizes the Secretary, from funds appropriated by Congress, to transmit and dispose of such hydroelectric power and energy by either (1) constructing transmission lines, or (2) by acquiring such lines, by "purchase or other agreement," including rental or wheeling (transmission) agreements.[3]

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[2] At present, disposition of power generated at 37 projects aggregating 3.9 million kw of capacity, in 16 States, is controlled by Section 5 of the Flood Control Act of 1944. 1974 SOUTHWESTERN POWER ADMINISTRATION ANN. REP. 2, 19; 1973 SOUTHEASTERN POWER ADMINISTRATION ANN. REP. 1, 8-10. Sister statutes, the Bonneville Project Act, 16 U.S.C.A. 838g, the Fort Peck Act, 16 U.S.C. 833 *et seq.*, and the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), contain provisions comparable to the Flood Control Act of 1944, authorizing the Secretary to transmit, or contract for transmission of, power generated at government power plants, and sell power thus delivered.

[3] A supplementary act, the Continuing Fund Statute, 16 U.S.C. 825s-1, enacted particularly to provide funding for the transmission agreements involved in this case, authorizes use of appropriated funds to pay rentals for the lines involved here.

Congress, in considering appropriation bills after enactment of the 1944 act, made a series of policy decisions declining to appropriate funds for construction of transmission lines, if wheeling agreements were attainable. This policy has continued until the present day.[4] It is placed in jeopardy by the Secretary's actions here, for reasons that we explain in Part I of the argument.

Congress also early established a policy of "postage stamp rates," that is, that rural customers of federal power projects, situated at a distance from government power plants, should pay no more for electricity than those located closer to the points of generation. This policy, too, is at hazard here, as pointed out in Part II of the argument.

In the present case, in 1950, Congress, having refused appropriations to construct transmission lines to deliver electricity from government power plants to rural electric cooperatives and other preference customers in Missouri, approved an alternate plan whereby such power would be transmitted over non-government lines to these customers, and delivered to them at their load centers at the basic SPA "postage stamp" rate, as though the lines had been constructed at government

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[4] For all Interior Department agencies marketing federal power, Congress has repeatedly directed that wheeling contracts are preferable to building transmission lines with appropriated funds. *E.g.*, 95 CONG. REC. 12023-36 (1949) (Senators Kerr, Johnson, Hayden, Thomas, and Fulbright) S. REP. No. 1672, 89th Cong., 2d Sess. 39-40 (1966) (Southwestern Power Administration); the Keating Amendment, 65 Stat. 255, reenacted in all Bureau of Reclamation appropriation acts since 1952; 96 CONG. REC. 17095-17100 (1959) (Southeastern Power Administration); H. R. REP. No. 93-1375, 93d Cong., 2d Sess. 4 (1974), 1974 U. S. CODE CONG. & AD. NEWS 5813 (Bonneville Power Administration); Potamkin, *Public Power and the Federal Government*, 30 NEB. L. REV. 375, 384-89 (1951).

expense. To bring such lines into existence, Congress approved the Secretary's proposal that (1) the rural electric cooperatives would borrow money from the Rural Electrification Administration (REA) to construct the lines desired by the Secretary; (2) he would lease them, paying rentals adequate to pay the REA debt service until that debt should be full repaid, plus operating expenses; (3) he would sell electricity to the cooperatives, thus delivered to their load centers, at the "basic SPA rate."[5] The government was thus relieved, as Congress insisted, of the burden of appropriating money to construct these lines.

The cooperatives borrowed the money from REA to build them, in reliance on the Secretary's dual promise to pay or credit on their power bills the agreed rentals until the REA debt is fully paid, and to deliver electricity to the cooperatives over these lines at the system-wide "postage stamp rate" as though the government had built them with appropriated funds. The lines were built and put to use by the Secretary, as he had proposed.[6]

The 1950 Interior Department appropriations act added a substantive authorization for appropriations to pay the wheeling charges on these lines. It is now codified as 16 U.S.C. 825s-1.

A succession of Secretaries faithfully carried out these arrangements for over 20 years (from 1950 to 1970), and Congress repeatedly appropriated money to pay the stipulated rentals.

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[5] Congress established the Continuing Fund to implement the Secretary's plan. 97 CONG. REC. 7864-7868; 10207-10 (1951), 95 CONG. REC. 12023-36 (1949). Congress reiterated these directives in 1955. See pp. 18-19 *infra*.

[6] The annexed map, Attachment "A," shows these lines, expanded in 1962 at the Secretary's request. (R. Vol. II at 426-28)

In 1961 the Secretary expanded these arrangements, to the government's great advantage, as he reported to Congress.[7]

He proposed,[8] to the cooperatives and FPC, that the Missouri cooperatives, state-wide, federate as Associated Electric Cooperative, and enter into a contract with him which would enable SPA to sell all of its power as "peaking" power, accompanied by limited quantities of energy, instead of firm power as previously. To accomplish this, it was necessary that the government hydro generation be integrated into that of investor-owned thermal-powered systems having five or six times the generating capacity of the government's hydro plants. Associated's lines would be employed to do this.[9] The Secretary would contract to sell peaking power to three large investor-owned companies (the Missouri Companies), to be delivered over Associated's lines. In addition, Associated would borrow money from REA to extend its lines to enable interconnection between SPA and the government's Missouri Basin system, some 300 miles away from SPA. Associated would wheel power to six municipalities. It would

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[7] *Hearings on Public Works Appropriations for F.Y. 1963 Before a Subcomm. of the House Comm. on Appropriations*, 87th Cong., 2d Sess., pt. 3 at 815 (1962).

[8] R. Vol. I, 245-69.

[9] The Secretary proposed: "2. 161 KV Transmission Facilities. The Government would continue paying under the existing arrangements for the use of the capacity in the Central and N.W. 161 KV lines with no substantial modification from the present contractual rights and obligations of the parties." (Ex. P-22, R. Vol. II 427-28.)

furnish power from other sources to make good all transmission losses. Associated would furnish "standby" power, in case of failure of government generating facilities. SPA would continue to sell power to the cooperatives, delivered, at the basic SPA rate, as before, but this would be the basic SPA rate for peaking power, not firm power.

The government promised to pay Associated $2,647,100 annually for its transmission services,[10] in the form of credits against payments for power and energy at the basic SPA rate for peaking power. This amount included, as theretofore, the annual debt service to REA (enlarged to build the interconnections stipulated by SPA), and operating costs, and it provided reimbursement to Associated for the power and energy it furnished to replace transmission losses. The contract would obligate the Secretary specifically to continue to pay (credit) this amount annually until the REA debt is fully paid (1997).

The cooperatives accepted the Secretary's proposal.

Again we invite attention to the annexed map. It shows that Associated's transmission system, made available to SPA (the red line) is the only interconnection between the government's Bull Shoals and Table Rock Dams, between these dams and Stockton Dam, and between the whole SPA grid and the Bureau of Reclamation's Missouri Basin system.[11]

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[10] Payment of an additional $2,008,900 for providing standby and other services is not in dispute.

[11] The interconnection is at Maryville, in northern Missouri.

The Secretary reported the success of his plan to Congress,[12] and Congress repeatedly appropriated money from the Continuing Fund to carry it out.[13]

Because of the wheeling arrangements and advantages of integration gained through SPA's contracts with Associated, Congress did not have to appropriate funds for the construction of new government-owned lines for Missouri.[14] The only appropriations, based on the Secretary's representations, were for lines to "implement the Associated and Missouri Co.'s contracts."[15]

In 1970, however, a new Secretary, without notice or hearing, promulgated a new "Transmission Service Charge," applicable to Associated alone, in the amount of $2,647,100 annually. It happens, not by coincidence, that this is the precise amount that the Secretary's contract obligates him to pay Associated. It would thus accomplish indirectly what the Secretary concededly cannot do directly, cancel a valid obligation.[16]

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[12] *Hearings, House Comm. on Public Works Appropriations, F.Y. 1963*, 87th Cong., 2d Sess., pt. 3 at 815, 823-24 (1962).

[13] *E.g.*, Public Works Appropriations Act for F.Y. 1964, P.L. 88-251, U.S. CODE CONG. & AD. NEWS 591 (1963); Interior Department justification, in *Hearings of House Comm. on Appropriations on Public Works Appropriations for F.Y.* 1964, 88th Cong., 1st Sess., pt. 3 at 699-700 (1963).

[14] "Facilities owned and to be constructed by an REA generation and transmission cooperative, as well as now existing, make the proposed construction unnecessary at this time." S. REP. No. 1672, 89th Cong., 2d Sess. 39-40 (1966).

[15] *Hearings on the Interior Dep't Appropriations Bill for 1964 Before a Subcomm. of the Senate Comm. on Appropriations*, 88th Cong., 1st Sess., at 143 (1963).

[16] See note 1 *supra*. After entry of summary judgment in Associated's favor in the District Court, the Secretary imposed a small "transmission service charge" on one other customer, the small town of Hermann, Mo. (App. 18a, n. 19)

SPA's motivation was brazen and plain:

> "Administrator King feels that under present conditions all power presently marketed under the Associated contract could be sold without any service charges being paid by the Government, in which case SPA could save over $4.5 million annually. He intends to make every effort to eliminate them." (Ex. 32, R. Vol. II at 479.)

It is important to note that the Secretary, while calling this a "rate revision," did not in fact change at all the uniform system-wide P-2 rate for peaking power charged by SPA to all customers, including these cooperatives. The new charge is an increase in cost of power to the cooperatives alone, and it was designed to accomplish this very differential. The cost to the investor-owned power companies to which Associated was obligated to wheel SPA power was left untouched.[17]

The Federal Power Commission, without a hearing, approved the transmission charge "simultaneously," as it said, with denying Associated's petition to intervene.

Judge Hart of the district court, after hearing cross motions for summary judgment, granted that of plaintiff, and denied that of defendants and the United States, holding that:

> "1. The Transmission Service Charge imposed be defendants on plaintiff is not a rate revision authorized by Section 5 of the Flood Control Act of 1944 or other statute;

[17] These rates remain, system-wide, $14.40 per kilowatt year of capacity, 2 mills per kilowatt hour of energy, for "peaking" purposes. 1,200 kwh of energy is supplied for each kw of capacity.

> "2. Defendants are not authorized by law to unilaterally reduce the amounts contractually owed to plaintiff for its transmission services; and
>
> "3. Defendants' actions were arbitrary, capricious and in abuse of discretion." (App. 23a.)

The court of appeals reversed in all three respects, and remanded the case to the district court, for determination of the value of the services rendered by Associated, these values to be substituted for the contract amount.

Associated would have no basic objection to a judicial determination of the amounts that SPA should pay for Associated's transmission services, if this were the only issue, provided that this determination relates to all services rendered in integrating SPA's system with that of the utilities, and transmitting all power and energy to all consumers and between SPA and the government's Missouri Basin System, taking into account the debts incurred at SPA's request to build the facilities to supply the services that SPA contracted for.

But the crux of the decision is that Associated will be allowed to keep only that portion of the newly determined compensation which relates to its transmission of power to customers other than the cooperatives.[18] This cost will not be added to the power bills paid by these other customers (primarily the three large Missouri utilities); SPA will continue to absorb it. By

[18] The court noted that, of the government power transmitted by Associated, only 52% is transmitted to the cooperatives, 48% to private utilities, municipalities, and the government's Missouri Valley system. (App. 20a.)

contrast (and this is the rub), the portion of the payments which relates to transmission of government power to the cooperatives will be taken back, by adding this exact amount to their power bills as a transmission service charge. We are thus forced into a "no win" situation: whatever the district court determines the Secretary properly owes for transmitting power to the cooperatives will be taken back from them by a transmission service charge in the same amount. The court of appeals decision would permit the Secretary to disown SPA's obligation, undertaken at the direction of the Appropriations Committees, to pay the debt service on the REA loans which financed the lines made available to SPA in lieu of federal appropriations to construct them, and to deliver electricity to them at the "basic SPA rate," as though congressional construction appropriations had been required.

Beyond the inequitable result in this particular case, the court of appeals decision, if not corrected, will have far-reaching and bizarre consequences in the administration of the numerous federal power resources governed by the Flood Control Act of 1944 and sister "postage stamp rate" statutes, and particularly in the implementation of the congressional policy of minimizing the need for construction appropriations by insisting upon wheeling agreements.

Three of these consequences are identified below.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Unprecedented Decision Below, Finding Authority in the Secretary to Unilaterally Reduce, Without Compensation, the Government's Contractual Obligations To Pay for the "Wheeling" of Its Power Over Transmission Lines Owned by Others, Is Without Statutory Justification, and, Unless Reversed, Will Make Hazardous the Continued Utilization of This Congressionally Directed Alternative to Construction of Transmission Lines at Federal Expense.

The directives of Congress in this case (*infra* p. 18) accord with a fixed congressional policy to not only encourage, but require, the Secretary's use of contracts to wheel power over lines financed by utilities wherever possible, as a preferable alternative to appropriation of federal money to build transmission lines.[19]

Here, the new SPA Administrator had other ideas. He assumed (1) that, contrary to the hypothesis of Congress, it is more expensive to pay wheeling charges equal to debt service plus operating costs than it is for the government to construct and operate lines, and (2) that the Secretary can therefore recover not only the difference between the two, but the whole agreed wheeling charge, leaving the other party burdened with the debt incurred to build lines to provide the service that the Secretary requested and contracted to pay for.

Nowhere has Congress, or the Secretary's contract, reserved authority to unilaterally modify any provision of the contract other than the P-2 rate, and this he has left unchanged at $14.40 per kw year for capacity, 2 mills per kw for energy. (App. 26a.)

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[19] See note 4 *supra*.

The court of appeals conceded (App. 14a):

> "Were the relationship of SPA to Associated only that of a lessee to a lessor there would be merit in Associated's contention that the Secretary's action was violative of the contractual provisions, as well as ultra vires under applicable federal law."

But it goes on to say:

> "This, however, is not the case. The Secretary also sells power and energy to Associated. Section 5 of the Flood Control Act expressly provides that the rates imposed with respect to a sale of power must be adequate to recover the cost of both providing and transmitting the power. The imposition of the transmission service charge thus falls within the Secretary's rate-making authority." *Id.*

This, we respectfully submit, is a non sequitur of serious proportions. If the Secretary, in his capacity as lessee, could not unilaterally extinguish the agreed lease rentals (as he is doing by retaking them, dollar for dollar), he does not acquire that authority by contracting to sell power to his lessor.

The decision would establish the principle that the Secretary, in the administration of "wheeling" contracts by which government power is transmitted over the lines of power companies and public agencies, is authorized to unilaterally reduce (to zero, on the authority of this case) the compensation that he has agreed to pay for wheeling service, if the utility has trapped itself by also entering into a power purchase agreement with the Secretary. It would be a novel (and dangerous) principle of contract law if the mere offsetting of the government's debt in one transaction

for services rendered by the other party, against the government's right to receive revenues in another transaction with the same party, gives the administrative officer a power not otherwise existing to unilaterally revalue (and, as here, extinguish) the compensation that the government has agreed to pay.

The use of the net billing method, ordered by Congress in our case in 1955 (*infra* p. 19), is commonly used in government wheeling contracts with utilities which also purchase government power, as here. On the Bonneville project, a government spokesman told Congress:

> "The Administration proposes to settle accounts with its customers on a net-balance basis. Under the proposal, the non-Federal utilities would bill the Administration for wheeling power over their lines, and for exchange energy account balances; the Administration would bill the non-Federal utilities for power supplied, for exchange energy account balances, and the wheeling of power over the Administration's lines. The non-Federal utility or the Administration, as the case may be, would then remit to the other party the net balance in money due for the billing period." *Hearings on Public Works Appropriations for 1961 Before the Subcomm. on Appropriations,* 86th Cong., 2d Sess., pt. 2 at 577 (1960).

Until now, it has not been suggested that use of "net billing" gives the Secretary the authority he claims for his Southwestern Power Administration to unilaterally redetermine, indeed extinguish, the amounts he owes.

If he has such authority here, he has it everywhere. Of course he does not, anywhere, and the court of

appeals' conclusion to the contrary requires correction. Otherwise, no utility can safely enter into wheeling contracts with the United States that utilize net billing, and this reiterated policy of Congress is in peril.

II.

A Dangerous and Fallacious Precedent Is Set by the Holding that the Secretary of the Interior May Reverse a Congressional Policy Decision, Imposing Detailed Conditions on the Expenditure of Appropriated Funds. These Conditions Required the Secretary To Effectuate the Congressional "Postage Stamp Rate" Policy by Including in His Power Contracts Specific Provisions Which He Would Now Abrogate.

In 1955 Congress reconsidered and reiterated its mandate that the Secretary deliver power to the Missouri cooperatives over the lines now in question, at the SPA "postage stamp" rate. The occasion was the resumption of appropriations after their interruption for two years in consequence of litigation which unsuccessfully attacked the validity of the Secretary's contracts with the cooperatives.[20]

In reporting out appropriations to resume the payment of rentals, the House Appropriations Committee imposed conditions to accomplish three objectives:[21]

> "This action makes it possible *to reactivate valid and legal contracts* which certain G. and T. (Generating and Transmission) cooperatives have with SPA.* * * *

[20] Kansas City Power & Light Co. v. McKay, et al., 115 F.Supp. 402 (1953), *vacated for lack of standing*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). The district court opinion described the existing arrangements in detail.

[21] H.R. Rep. No. 747, 84th Cong., 1st Sess. 5-6 (1955). These "valid and legal contracts" specifically required the Secretary to continue to pay rentals until the REA debt is paid. The 1962 contract reconfirms this obligation. See note 1 *supra*.

> "In reactivating the contracts with the G. and T. cooperatives, *the Department of the Interior is instructed* to delete any provisions providing for the option to purchase G. and T. transmission lines or other facilities by the Southwestern Power Administration. The contracts are also to provide: (1) that the G. and T. cooperatives will operate and maintain their own transmission systems under lease to the SPA; (2) that the SPA and the G. and T. cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties; and (3) *that power and energy will be delivered to the load centers of all G. and T. contracting systems at the basic SPA rate.*" (Emphasis added.) (Ex. P-16, R. Vol. II, 418.)[22]

The "postage stamp rate" thus ordered had been fixed federal policy for a decade and a half.[23] Its

[22] The Conference Report on that same appropriation bill contained comparable language. H.R. Rep. No. 1085, 84th Cong., 1st Sess. (1955). (Ex. P-17, R. Vol. II, 419.)

[23] One of the earliest articulations of the "postage stamp rate" policy came in 1937 in a message to Congress by President Roosevelt, adopting and endorsing the report of his Committee on National Power Policy. He told Congress that federal rate schedules were to provide:

> ". . . for uniform rates or rates uniform throughout prescribed transmission areas with a view to distributing the benefits of an integrated transmission system and encouraging the equitable distribution of the electric energy developed." S. Doc. No. 21, 75th Cong., 1st Sess. 2-4 (1937).

This policy has been carried out on the TVA, Bonneville, Southeastern Power Administration, and Missouri Basin Systems, and, until now, on the SPA System.

essence is that rural customers at a distance from the government's power plants shall be charged no more than customers situated near the plants.

The court of appeals declined to give effect to the Committee's directives, enforced for 15 years.

On this issue, the court erred in several respects.

(1) It ignored the fact that the Secretary obeyed the congressional decision by incorporating the required changes *in haec verba* in amendatory contracts (R. Vol. II, at 63-64), which in turn were the subjects of appropriations for over a decade.

(2) An appropriations committee's report imposing conditions on the expenditure of appropriated funds, which are accepted and executed by the executive agency to which they are directed, is not simply an aid to legislative construction, as are committee reports generally; such directives have a special and controlling status. A record of continued appropriations "constitutes ratification of administrative construction, and confirmation and approval of the contracts." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 293 (1958); *Brooks* v. *Dewar,* 313 U.S. 354 (1941).

The court's opinion makes disturbing new law, in telling executive agencies that conditions imposed on use of funds in the reports of the appropriations committees have no binding effect, and can be reversed by an administrator, even after he has incorporated them, as the committees required here, in the contracts which make use of the funds so appropriated.[24]

[24] The court of appeals implies (App. 9a and n. 9) that Congress' lack of action with respect to the transmission service charge invalidates Associated's view of past committee action and appropriations. There was no reason for Congress to act, because appropriations are not required now because of the net balance billing method.

The court's answer is that there is nothing to show that the committees or Congress as a whole "had any intent to require as a matter of law that the Secretary sell power at less than cost contrary to the explicit directive of Section 5 of the Flood Control Act." (App. 13a.)

This misses the point. Even putting to one side the Secretary's fallacy, acknowledged by the court of appeals, in comparing receipts for 52% of the power with costs incurred in transmitting 100% of it, and disregarding Congress' reiterated hypothesis that renting transmission capacity is cheaper than appropriating construction funds, the point remains that if power is truly being sold at less than cost, the statutory remedy is an increase in the basic rate, to all customers. The remedy selected by the Secretary was to discriminate against customers served over leased lines by violating the statutory direction and the contractual promise that these lines shall be treated as part of the SPA system,[25] in consideration of their construction at the expense

[25] The Secretary's contracts specifically define the "System of SPA" as including not only the SPA government-owned grid, but the lines of Associated made "available to SPA" by the Associated-SPA contract. (R. Vol. II, at 326.) The transmission service charge discriminates against the cooperatives in two respects: (1) by drastically increasing (over 40%) the cost of electricity to the government's customers served via its transmission contract above the cost to those served via government-owned lines (even though, as Congress has consistently posited, the government's wheeling costs may be less than costs related to government construction and operation), and (2) by exempting the private companies and federal facilities to which government power is wheeled over these particular lines from the transmission service charge imposed on the cooperatives served over them. We equate the mandate in Section 5 of the 1944 Flood Control Act "for sale on fair and reasonable terms to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies" with sale on non-discriminatory terms and conditions.

of the customers, and that power delivered thereby shall be charged for at the basic SPA postage stamp rate.

The court's rationalization (App. 15a-16a) that the Secretary's unilateral change of delivery points from the contractual delivery points near load centers of the cooperatives (at Congress' direction) to points on the SPA grid, requiring the cooperatives to pay the old rate for delivery at the new points, is itself a rate revision, hence within his authority to revise rates. This novel interpretation of Section 5 of the 1944 Flood Control Act, without support in the legislative history, or 26 years of administrative construction, proves too much. It would as logically apply to changes in the contracts of customers who take power from points on the SPA grid as to customers served over leased lines, as in this case.

If the court of appeals is right, the Secretary could tomorrow, without hearing, change all deliveries from contractual points on the SPA grid itself to the bus bars of the power plants, adding a transmission service charge to deliver power to the contractual points on the SPA grid from these new and arbitrary delivery points. By the same token, on the Bonneville, Missouri Valley, and TVA projects, where power is delivered at points on the government-owned transmission grid, the administrator could unilaterally change these delivery points to the bus bars of the power plants, charge the old rate at the new points, and add a transmission service charge to deliver power to the contract points—if the new law established by the court of appeals in our case is not corrected.

The Secretary has no such power to reverse Congress' "postage stamp rate" policy.

III.

The Decision Below Denies that the Secretary of the Interior and the Federal Power Commission Are Under a Constitutional Duty To Afford Due Process to Parties to Government Contracts Whose Rights They Would Reduce or Cancel. If Due Process Is Required in Such Cases, to Any Degree, the Decision of the Court of Appeals Must Be Reversed, Because the Secretary and the Commission Did Not Grant Any at All, and Denied Their Responsibility To Do So.

The Secretary lacked authority to take back the compensation that he admittedly [26] owes for the use of the cooperatives' lines, and he cannot do by indirection what he cannot lawfully do directly. The due process question, therefore, is one of substantive, not merely procedural, due process. He has taken property without compensation. *See United States* v. *Northern Pac. Ry. Co.*, 256 U.S. 51 (1921); *Lynch* v. *United States*, 292 U.S. 571 (1934). This Court long ago held that where the federal government induces another party to construct facilities for its benefit in return for a promised consideration, the government is bound by a contractual obligation, *Burke* v. *Southern Pac. R.R. Co.*, 234 U.S. 669, 679-80 (1914), and rights thereunder are entitled to due process protection. *United States* v. *Northern Pacific Ry. Co.*, 256 U.S. 51, 64 (1921). Three weeks of elaborate hearings could not have infused any validity into his actions.

The district court held, we think properly, that the Transmission Service Charge was not a rate revision at all. But, if the court of appeals' contrary premise is assumed, disturbing consequences follow as to the procedural due process required in the exercise of the

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[26] Defendants' answer, quoted note 1 *supra*.

Secretary's rate-making powers.[27] This case is the first in which a court of appeals has considered that subject.

The court of appeals, treating the question as one of procedural due process, held that the Secretary was not obliged to give the other party to the contract notice, hearing, or even opportunity to comment, before changing its terms. No record, no findings, were made. See *FPC* v. *Texaco*, 417 U.S. 380 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962). The court nevertheless felt that, because the Secretary did not act in a vacuum, but had secret reports from his staff, his action is to be sustained (App. 18a). The court even took into account, in reaching that conclusion, ex post facto affidavits by staff members, submitted to the district court in its hearing on the motions for summary judgment, as to what they thought they told the Secretary, in private. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Burlington Truck Lines*, *supra*. The Secretary gave Associated no opportunity to probe his staff's rationale. The Federal Power Commission was just as arbitrary. It held no hearings,[28] exercised no independent exper-

[27] The court of appeals' opinion, unless corrected, will control review of the Secretary's rate-making functions not only under the Flood Control Act of 1944, but under the Bonneville Project Act, 16 U.S.C.A. 838g, the Fort Peck Act, 16 U.S.C. 833, and the Reclamation Project Act of 1939, 43 U.S.C. 485h(e), which all contain cognate provisions on this subject. A district court in this Circuit has held the Secretary to much stricter account in his rate-making on the Central Valley Project under a similar statute. Northern California Power Agency, et al. v. Morton, et al., C.A. No. 74-617 (D.D.C. Feb. 14, 1975).

[28] Yet the Commission has itself acknowledged the necessity for hearings on the Secretary's proposal to increase rates on the Bonneville power system. United States Dep't of the Interior, Bonneville Power Administration, Docket No. E-8978, — F.P.C. — (Dec. 19, 1974).

tise, denied Associated permission to intervene, "simultaneously," as it said, with approving the Secretary's action. It relied on in-house exchanges, via telephone and letter, with the Secretary's staff.

But the court of appeals saw nothing wrong.

This is disturbing law to create in the Circuit which hears the great bulk of petitions to review actions of administrative agencies.

CONCLUSION

We ask that the Court grant certiorari, because of the importance of the issues in this case to the sound administration of the many federal power projects which are controlled by Section 5 of the Flood Control Act of 1944, and, by extension, those projects which are controlled by other members of the same family of federal power statutes administered by the Secretary of the Interior.

These questions have not been, but should be, decided by this Court.

Respectfully submitted,

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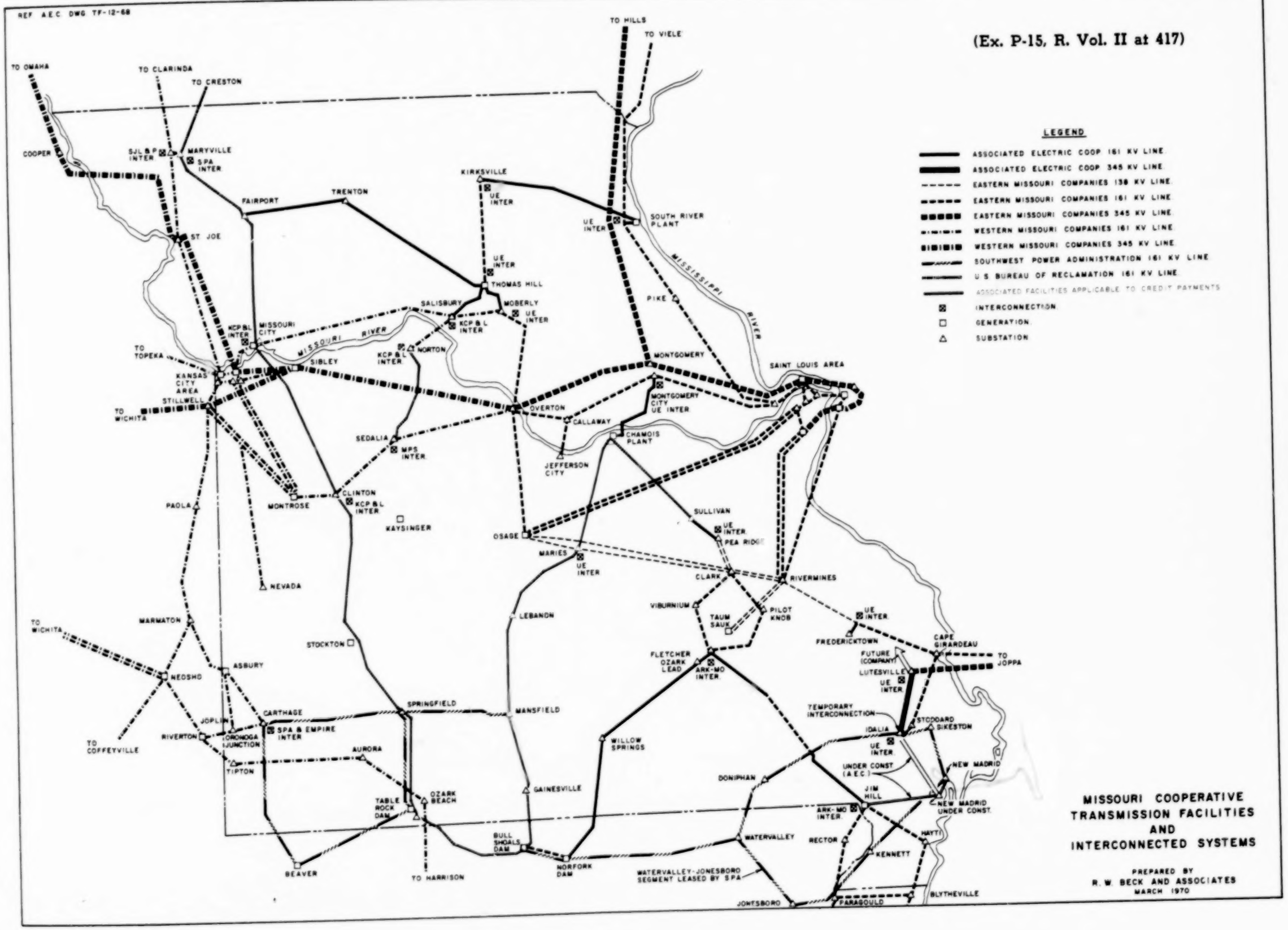
ATTACHMENT "A"

(Ex. P-15, R. Vol. II at 417)



MISSOURI COOPERATIVE TRANSMISSION FACILITIES AND INTERCONNECTED SYSTEMS

PREPARED BY
R. W. BECK AND ASSOCIATES
MARCH 1970

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1438

ASSOCIATED ELECTRIC COOPERATIVE, INC., *Petitioner,*

v.

ROGERS C. B. MORTON, individually and as Secretary of the Interior, and PETER C. KING, individually and as Administrator of the Southwestern Power Administration, UNITED STATES OF AMERICA (Intervening Defendant),
JOHN N. NASSIKAS, ET AL., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

Opinion of the Court of Appeals, *Associated Electric Cooperative, Inc. v. Morton, et al.*, 507 F.2d 1167 (D.C. Cir. 1974) 1a

Order of the Court of Appeals denying petition for rehearing, December 16, 1974 ..... 22a

Order of the District Court granting summary judgment, *Associated Electric Cooperative, Inc. v. Morton, et al.*, Civil Action No. 2410-70 (D.D.C. Jan. 8, 1973) 23a

Order of the Federal Power Commission, 43 F.P.C. 804 (1970) 25a

Order of the Federal Power Commission, July 24, 1970 32a

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1601

ASSOCIATED ELECTRIC COOPERATIVE, INC.

v.

ROGERS C. B. MORTON, Individually and as Secretary of the Interior and PETER C. KING, Individually, and as Administrator of the Southwestern Power Administration

UNITED STATES OF AMERICA
(Intervening Defendant)

JOHN N. NASSIKAS, ET AL

No. 73-1690

ASSOCIATED ELECTRIC COOPERATIVE, INC.

v.

ROGERS C. B. MORTON, Individually and as Secretary of the Interior and PETER C. KING, Individually, and as Administrator of the Southwestern Power Administration

UNITED STATES OF AMERICA
(Intervening Defendant)

JOHN N. NASSIKAS, ET AL
(Members of Federal Power Commission), APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action 2410-70)

Decided November 18, 1974

Thomas G. Wilson, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief for appellant, Morton, King and the United States. *Robert B. Kopp*, Attorney, Department of Justice, also entered an appearance for appellants Morton, King and the United States.

Northcutt Ely, with whom *Frederick H. Ritts* and *James E. Hickey, Jr.*, were on the brief, for appellee, Associated Electric Cooperative, Inc.

Before: MACKINNON and WILKEY, *Circuit Judges* and JAMESON,* *United States Senior District Judge* for the District of Montana

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *District Judge*: This is an appeal from a summary judgment in favor of plaintiff-appellee, Associated Electric Cooperative (Associated), against Rogers C. B. Morton, Secretary of the Interior, Peter C. King, Administrator of the Southwestern Power Administration (SPA), the United States of America, and the members of the Federal Power Commission (FPC) in an action to declare unlawful and to enjoin the collection of a

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

transmission service charge imposed by the Secretary and approved by the Commission.

In 1962, pursuant to Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, SPA entered into contracts with Associated for the sale of federal hydroelectric power and energy, at rates set by the Secretary of the Interior, approved by the FPC, and providing for the allowance of credits for services to be performed by Associated in transmitting power and energy for SPA's account. In 1970 the Secretary revised the rate schedule by adding a "transmission service charge" to recover costs incurred by SPA for which SPA claimed it was receiving no commensurate benefit in services from Associated.

Associated then brought this action seeking to enjoin and have declared illegal the Secretary's 1970 modification of the rate schedule, on the ground that the cancellation of credits allegedly due under the 1962 contract was in violation of the Secretary's statutory authority and of the contract. The defendants denied these allegations of the complaint and as an affirmative defense alleged that Associated's contract credits were invalid because they violated standards contained in the Flood Control Act of 1944. The United States [1] counterclaimed for recovery of the transmission service charges as set forth in the modified rate schedule.

Both sides moved for summary judgment. The district court granted Associated's motion in a brief order stating that the court had concluded "that the defendants' actions were unlawful in that:

1. The Tranmission Service Charge imposed by defendants on plaintiff is not a rate revision author-

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[1] Initially Morton, King and the members of the Federal Power Commission were named as defendants. The United States was granted leave to intervene as a defendant.

ized by Section 5 of the Flood Control Act of 1944 or other statute; and

2. Defendants are not authorized by law to unilaterally reduce the amounts contractually owed to plaintiff for its transmission services; and
3. Defendants' action were arbitrary, capricious and an abuse of discretion".

Flood Control Act of 1944

The Flood Control Act of 1944 (58 Stat. 890) provides in Section 5 (16 U.S.C. § 825s) that hydroelectric power produced by certain Army dams "shall be delivered to the Secretary of the Interior" for disposal by him "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery * * * of the cost of producing and transmitting such electric energy". The Act provides further that "Preference in the sale of power shall be given to public bodies and cooperatives", and the Secretary is authorized to construct or acquire only such transmission facilities as may be necessary to make the power and energy "available in wholesale quantities for sale on fair and reasonable terms" to facilities owned by others.

Contracts Prior to 1962

SPA was designated as the marketing agent for the sale of power and energy pursuant to Section 5 of the Flood Control Act of 1944. Initially, SPA proposed to construct extensive facilities, including a transmission system, but this approach was rejected by Congress in 1946.[2] The Administrator of SPA then entered into negotiations with representatives of various distribution cooperatives in Missouri concerning a proposal whereby generation and transmission cooperatives (G & Ts) would be organized to construct transmission facilities and steam-generating plants with funds borrowed from the Rural Electrification Agency (REA). As a result of these negotiations, during 1949-1951 SPA, with the approval of the Solicitors of the Department of the Interior and the Department of Agriculture, entered into a series of 40-year contracts with six Missouri G & Ts and others.

[2] See 92 Cong. Rec. 7186-7200.

The contracts contained three interrelated agreements: (1) by loan contracts, REA was to loan funds to the G & Ts for the construction of generating and transmission facilities; (2) by lease contracts, SPA was to lease for 40 years the transmission facilities to be constructed with the loans and to pay all costs of operation, maintenance, repair and capital replacements, as well as amortization payments on the loans; and (3) by power contracts, SPA was to purchase the entire output of the steam plants to be constructed and in turn to resell to each of the G & Ts their power and energy requirements.[3] Congress, expressing its approval of the plan, established a "continuing fund" out of which the Secretary was authorized to make expenditures, including expenditures for rentals of transmission lines.[4] Congress appropriated funds for this purpose until 1954.

The operation of these contracts was suspended during fiscal years 1954 and 1955 when Congress withheld appropriations. In 1956 Congress resumed appropriations

[3] In a suit by private utility companies the Secretary's authority to enter into these agreements was sustained in *Kansas City Power & Light Co.* v. *McKay*, 115 F.Supp. 402, 407-408 (D.D.C. 1953), judgment vacated for lack of plaintiffs' standing to sue, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

[4] 16 U.S.C. § 825s-1.

and reactivated the lease contracts. In doing so the House Committee on Appropriations instructed the Secretary that the contracts should be amended to provide that (1) G & Ts would operate and maintain their own transmission system under lease to SPA; (2) SPA and G & Ts would settle accounts for power sold on the basis of net balances, that is, the bill for power sold would be reduced by credits to the G & Ts for their costs of operating and maintaining the transmission facilities; and (3) power and energy would be delivered to the load centers at all G & T contracting systems at the "basic SPA rate".[5] The amendments were made pursuant to the Congressional instructions.

1962 Contract Between SPA and Associated

It was subsequently recognized that the existing contracts might not be adequate to fulfill the G & T's power requirements. Accordingly they were superseded in 1962 by a new contract between SPA and Associated. Associated was created in 1961 as a master cooperative, composed of the Missouri G & Ts, for the purpose of consolidating their loads and facilities and building new generation facilities.

Under the 1962 SPA-Associated contract, SPA sells to Associated under the applicable rate schedule (P-2) [6] 288 megawatts of peaking power, plus all of the energy generated at the Table Rock and Bull Shoals power plants less certain reserve quantities. The contract specifies

[5] House Committee on Appropriations in its Report to Accompany T. R. 6766, the Public Works Appropriation Bill for F.Y. 1956 (H.R. Rep. No. 747, 84th Cong. 1st Sess. pp. 5-6).

[6] The P-2 Rate Schedule provides for a demand charge for high voltage delivery of $14.40 per kilowatt per year and an energy charge of 2 mills per kilowatt hour.

that rates may be increased or decreased by SPA, subject to approval of the FPC.[7]

The contract requires Associated to provide certain services to SPA, including transmission, reserves, power and energy losses and operation and maintenance of certain isolated SPA facilities. As consideration for these services, Associated is to receive the following credits:

"Contract Credits to Associated	*Annual Payments*
1. *Transmission Service*	
*161 kv (Existing)	$1,099,000
*161 kv (New Facilities)	516,000
69 kv (SPA's Customers)	278,000
2. *Power and Energy Transmission Losses (10%)*	
*Capacity	777,000
*Energy	256,000
3. *Reserve Generation (Standby)*	1,152,000
4. *Suspension [of] Contracts (Power Plants)*	493,000
5. *Operation and Maintenance, SPA Isolated Facilities*	85,000
TOTAL	$4,656,000"

[7] Besides the contract between Associated and SPA, four other related contracts were executed at approximately the same time. One agreement suspends the contracts between SPA and the Missouri G & T's unless the SPA-Associated contract is terminated prior to July 1, 1995 in which case the suspended contracts are revived. Others include a contract by SPA with three Missouri utility companies under which it sells them 190 megawatts of capacity with 1200 hours of energy under the P-2 Rate Schedule; a contract between Associated and the utility companies; and contracts between Associated and its six members.

The Secretary reported the new contractual arrangements to Congress. Congress continued to appropriate money to the "continuing fund" to cover, among other items, the cost for rental and use of transmission facilities.

During the period between 1962 and the time of this action, the Associated-SPA contract came under sharp criticism from other government agencies. The Federal Power Commission repeatedly expressed concern that SPA was failing to meet the requirements of the Flood Control Act—that "rate schedules shall be drawn having regard to the recovery of the costs of producing and transmitting such electric energy, including the amortization of the capital investment * * *". The contract credits allowed Associated were singled out as the primary cause.[8]

Revised Rate Schedule in 1970

In 1969 appellant King was appointed Administrator of SPA. From a study of the marketing of SPA's power and energy, he found that rather than recovering the cost of Government facilities, as required by the Act of 1944, SPA was in fact losing money and that the largest part of the loss resulted from the SPA-Associated contract. Based upon a report of the SPA staff, he determined that SPA had received little benefit from the services for which Associated was credited, and that the credits accordingly were a cost to SPA which was not being recovered.

The Administrator concluded that the loss in revenue and failure to recover costs could not be justified under the directive of the Flood Control Act of 1944. Accordingly he prepared a revised Rate Schedule P-2 which included a new charge for transmission of power and energy to points beyond SPA's high voltage grids. There were no other customers besides Associated to whom the

[8] 40 F.P.C. 291, 295 (1968).

new transmission service charge was applicable. This charge effectively eliminated the credit items marked with an asterisk on the chart set forth *supra*.

The Secretary concurred in the Administrator's action and submitted the revised rate schedule to the FPC on January 30, 1970. On May 28, 1970, the FPC issued an order confirming the new schedule and denying Associated's petition for intervention and request for a full hearing. The relevant appropriation subcommittees of each House of Congress were made aware of the new transmission service charge, but no action was taken by Congress with respect thereto.[9]

In July, 1970, the SPA began to bill Associated for the new transmission service charge. Associated refused to pay the new charge and challenged its imposition by instituting this action on August 12, 1970.

[9] The committees were advised by the Administrator during the 1970 hearings of the filing of the proposed rate with the FPC. Hearings, Senate Committee on Appropriations, Public Works, etc., Appropriations for 1971, 91st Cong., 2d Sess. ser. 26, pt. 3 at 331, 368 (1970); Hearings, House Committee on Appropriations, Public Works, etc., Appropriations for 1971, 91st Cong., 2d Sess., ser. 41, pt. 3 at 999-1000 (1970). The rate increase was also mentioned to the committees the following year. Hearings, House Committee on Appropriations, Public Works, etc., Appropriations for 1972, 92nd Cong., 1st Sess., pt. 2 at 773-774 (1971). At the House committee hearings on the 1973 appropriations bill, the Administrator advised the committee of the status of this suit. Hearings, House Committee on Appropriations, Public Works, etc., Appropriations for 1973, 92nd Cong., 2d Sess., ser. 38 pt. 3 at 765 (1972). And in 1973, he gave the Senate Committee a similar report and generally discussed the rate to Associated. Hearings, Senate Committee on Appropriations, Public Works, etc., Appropriations for 1974, 93rd Cong., 1st Sess., pt. 3 at 3181-3184 (1973).

Contentions of Appellants

In urging reversal of the order granting summary judgment in favor of Associated, appellants contend that:

(1) the transmission service charge represents a valid exercise of the Secretary's rate-making powers under the Flood Control Act of 1944;

(2) (a) the transmission service charge is consistent with the contract between Associated and SPA, but (b) if the contract credits and the service charge are inconsistent, then the service charge, which is an exercise of the Secretary's rate-making power, must prevail;

(2) the Secretary's exercise of his rate-making authority is not subject to judicial review;

(4) even if judicial review is found to exist, the service charge is not discriminatory, arbitrary or capricious;

(5) it was not necessary for the FPC to hold a formal evidentiary hearing prior to approving the rate change by the Secretary;

(6) by reason of the foregoing, summary judgment should have been entered in favor of the defendants; but

(7) in the alternative, the court erred in granting summary judgment in favor of Associated because there were disputed issues of fact "as to whether the credits were non-existent or grossly overruled and therefore illegal under the statute".

Validity of Secretary's Action Under Rate-Making Power of Flood Control Act

The Flood Control Act of 1944 specifically authorizes the Secretary of the Interior to dispose of power produced "at reservoir projects under the control of the [Department of the Army] . . . at the lowest possible rates to consumers consistent with sound business prin-

ciples, . . . having regard to the recovery . . . of the cost of producing and transmitting such electric energy . . .". 16 U.S.C. 825s. Appellants contend that transmission expenses are costs which the statute authorizes and mandates the Secretary to recover, and accordingly, in making the revised rate schedule, the Secretary was merely complying with the directives of the Flood Control Act.

On the other hand, Associated contends that Congress has limited the Secretary's rate-making authority in various appropriation acts which in effect constitute *de facto* amendments to the Flood Control Act of 1944. Associated refers to reports of Congressional appropriation committees in 1950, 1951, 1956, and 1962-66 authorizing and directing the Secretary to enter into contracts with the cooperatives, whereby the cooperatives, with loans from REA, would construct transmission lines. The Secretary in turn was to agree to lease the lines and compensate the cooperatives in an amount sufficient to service the REA loans and cover operating costs. The Secretary was also directed to deliver power over the lines of the cooperatives to their load centers at the "basic SPA rate".[10]

Associated argues that Congress in appropriating funds to implement the committee reports ratified the directives of the committees and gave them the force of law. It is Associated's position that in establishing

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[10] While the House Committee on Appropriations spoke of power being delivered at the "basic SPA rate" (H.R. Rep. No. 747, 84th Cong., 1st Sess., pp. 5-6 (1955)), it is significant that in its report, the conference committee called for delivery of power to the G & T's "at the basic SPA rate" "*if practical*", (H.R. Rep. No. 1085, 84th Cong., 1st Sess., p. 4 (1955)) (emphasis added). The addition of the phrase "if practical" indicates that the committee instructions were not as binding as Associated contends.

the transmission service charge, appellants effectively eliminated the rentals directed to be paid Associated, and also that appellants are billing Associated at a rate in excess of the "basic SPA rate". In essence Associated contends that Congress in appropriating funds to cover deficits incurred by SPA manifested approval of SPA's failure to attempt to recover costs as required by the Flood Control Act.

We cannot agree with the reasoning of Associated. In the first place, no cases hold that legislative histories carry the force of law. On the contrary, *In re Evans*, 452 F.2d 1239, 1245 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972) holds that "[w]hile committee reports are unquestionably entitled to weight in determining the purpose of a statute, they are neither enacted by Congress nor signed by the President, and thus they do not have the force of legislation".

Furthermore, simply because Congress ultimately enacted legislation appropriating funds to implement the contractual scheme between SPA and the cooperatives gives no greater weight to the committee reports. While it is true that appropriations in some instances may constitute ratification, it is also clear that ratification by appropriation will not be found unless prior knowledge of the specific disputed action can be clearly demonstrated, *D.C. Federation of Civic Associations* v. *Airis*, 391 F.2d 478, 482 (D.C. Cir. 1968) and the appropriation plainly shows "a purpose to bestow the precise authority which is claimed". *Ex parte Endo*, 323 U.S. 283, 303 n. 24, 65 S.Ct. 208, 89 L.Ed. 243 (1944).[11]

[11] Moreover, the rules of each House of Congress expressly provide that appropriation bills are not to include general legislation. Rule XVI, para. 2, 4, Standing Rules of the Senate, Rules and Manual, United States Senate, 84th Cong. (1955); Rule XXI, para. 2, Rules of the House of Representatives, Rules and Manual, House of Representatives, 84th Cong. (1955).

It is anything but clear that the Congressional committees or Congress as a whole had any intent to require as a matter of law that the Secretary sell power at less than cost contrary to the explicit directive of Section 5 1175 of the Flood Control Act.[12] The mere fact that Congress appropriated funds to cover previous deficits of SPA is not inconsistent with SPA's attempt to recover costs in the future. Congress has been advised of the imposition of the transmission service charge since 1970, but there is nothing in the record to indicate that Congress or any of its committees has ever suggested that the charge is illegal or improper.[13] We find nothing in the actions of Congress which has limited the rate-making authority of the Secretary under the Flood Control Act of 1944.

Associated next contends that the Flood Control Act itself does not authorize the Secretary to impose the transmission service charge. Associated points out that the Act gives the Secretary authority to make three kinds of contracts (1) powers sale contracts, (2) power purchase contracts, and (3) contracts to acquire transmission lines.[14] Associated argues that the Secretary's rate-making power applies *only* to power sale contracts. Associated admits that the 1962 contract has a power sale aspect. It contends, however, that the contract provision for transmission services is not a part of the power sale but rather involves the acquisition of transmission

[12] "* * * [R]epeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest' ". *United States* v. *Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[13] See note 9 *supra*.

[14] Associated relies on a construction given Section 5 in a Solicitor's Opinion, July 15, 1949, 95 Cong. Rec. 11449 (1949).

facilities. The Secretary, therefore, has no authority to unilaterally reduce the stipulated rental payments made by SPA.

This contention of Associated is without merit. Under the terms of the 1962 SPA-Associated contract, the Secretary acts in a dual capacity. He not only leases the transmission lines from Associated, but also utilizes the transmission lines to deliver electrical power and energy to Associated. Thus, two separate contractual obligations are involved. The Secretary agrees that in his capacity as lessee of the transmission lines, he cannot unilaterally alter the agreed lease price. Were the relationship of SPA to Associated only that of a lessee to a lessor there would be merit in Associated's contention that the Secretary's action was violative of the contractual provisions, as well as ultra vires under applicable federal law. This, however, is not the case. The Secretary also sells power and energy to Associated. Section 5 of the Flood Control Act expressly provides that the rates imposed with respect to a sale of power must be adequate to recover the cost of both providing and transmitting the power. The imposition of the transmission service charge thus falls within the Secretary's rate-making authority.

Validity of Transmission Service Charge Under 1962 Contract

The 1962 SPA-Associated contract incorporated the statutory rate-making authority of the Secretary under the Flood Control Act. The contract states:

> "The rates set forth in the said Rate Schedule P-2, or the rates in any superseding rate schedule may be increased or decreased by SPA from time to time subject to the confirmation and approval by the Federal Power Commission . . .".

Having concluded that the imposition of the transmission service charge was within the statutory rate-making au-

thority of the Secretary, it is our opinion that the charge was also authorized by the terms of the 1962 contract between SPA and Associated.

Associated argues that even if the transmission service charge is a revision of the rate schedule, "it is an attempt to make the cooperatives pay twice for the same service because the contract rate [of $14.40 per kilowatt per year which has not been changed] includes transmission to the same points of delivery for which SPA would now charge them a second time".

The plaintiff's argument misconstrues the nature of the Secretary's rate-making power. The point of delivery of the power or egergy is as much a part of the rate schedule as is the price per kilowatt per year. The 1962 P-2 rate schedule stated that "Delivery of hydro and/or seasonal peaking power service will be from, and at the voltage of the 138 kv or the 161 kv *transmission systems owned by or available to SPA* . . .". (emphasis added). The revised schedule's prices per kilowatt per year include transmission *only as far as the SPA high voltage grid.*[15] In other words, the $14.40 rate does not recover costs of transmission beyond the SPA high voltage grid. Costs of transmission beyond that grid are recovered by the new transmission charge.[16] This change in the condition of the service constitutes an exercise of the Secretary's rate-making power and is

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[15] We agree with appellants that "What the transmission service charge does * * * is change the point at which SPA begins to *charge* for the costs incurred in the delivery of the power and energy".

[16] Because of the credits received by Associated, SPA incurs costs of transmission beyond the high voltage grid. Other customers of peaking power take it from SPA's high voltage grid and as to them SPA incurs no cost of transmission beyond its grid.

thus authorized both by the Flood Control Act and the SPA-Associated contract.

We conclude that the contract between SPA and Associated does not preclude the imposition of the transmission service charge.[17]

Judicial Review of Rate-Making

The Administrative Procedure Act of 1946 "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701 (a)". *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* In *Data Processing Service* v. *Camp*, 397 U.S. 150, 156-157, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)), the Court in quoting from a House Report at the time of the passage of the Administrative Procedure Act stated:

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold

[17] Even assuming that the transmission charge were precluded by the terms of the SPA-Associated contract, the transmission charge is nevertheless within the Secretary's rate-making power under the Flood Control Act. It is well settled that a Government agency cannot contract in derogation of its statutory powers. *See United States* v. *City and County of San Francisco*, 310 U.S. 16, 28, 60 S.Ct. 749, 84 L.Ed. 1050 (1940).

> it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review. H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41."

Appellants argue that there is no right of judicial review by reason of the provision in 5 U.S.C. § 701(a)(2) that judicial review shall not apply to "agency action * * * committed to agency discretion by law". This exception has been characterized by the Supreme Court as a "very narrow" one. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). "The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)." *Id.*

The construction of the Flood Control Act of 1944 and the 1962 contract between SPA and Associated requires legal as well as factual determinations. Given the narrowness of the exception and the presumption of reviewability, we conclude that the agency action here, although it involves rate-making,[18] is not "committed to agency discretion by law" and is therefore subject to judicial review.

[18] Appellants rely heavily on *Panama Canal Co.* v. *Grace Lines Inc.*, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958) which held that the "initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." *Id.* at 317. The case was concerned with the failure to initiate new rate-making and the Court held that judicial review was precluded. The Court noted, however, that "We do not say, for we are not called upon to do so, that no justiciable issue can arise out of the toll-making procedure for the Panama Canal. All we hold is that the controversy at present is not one appropriate for judicial action". *Id.*

Were Actions Arbitrary, Capricious and an Abuse of Discretion?

Associated argues, and the district court held, that defendants' actions were arbitrary, capricious and an abuse of discretion. This contention is answered in large part by our conclusion that the imposition of the transmission service charge was a proper exercise of the Secretary's power. In proposing the rate revision to the FPC, the Secretary, as indicated in the affidavits in support of defendants' motion for summary judgment, relied upon a Rate and Repayment Study dated January, 1970 and upon the expert opinion of the power engineers of his staff. It cannot be contended that the Secretary acted in a vacuum. Simply because other reports and studies were available and ignored by the Secretary does not make his actions arbitrary or capricious.

Moreover, the fact that Associated was the only customer of SPA [19] that was affected by the rate revision does not necessarily make the transmission charge discriminatory. A rate distinction between those companies which take their power directly from the high voltage grid of SPA and those which require delivery of power by SPA beyond SPA's high voltage grid is not unreasonable.

Associated further argues that the action of the Federal Power Commission in denying its petition to intervene and request for a hearing was arbitrary, capricious and an abuse of discretion. The court disagrees. A "rule" is defined by the Administrative Procedure Act to include ". . . approval or prescription for the future of rates, . . .". 5 U.S.C. § 551(4). Having determined that

[19] At the hearing on appeal, the Secretary stated with respect to the discrimination contention that one other SPA customer, the City of Hermann, now pays a charge for transmission beyond the high voltage grid.

the imposition of the transmission service charge was an exercise of rate-making power of the secretary, we conclude that the action of the FPC in approving the proposed charge constituted rule-making. A formal evidentiary hearing is not required in rule-making proceedings. *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 93 S.Ct. 810, 818 (1973).

In addition, the Administrative Procedure Act provides that a hearing is not required where there is involved "a matter relating to * * * public property". 5 U.S.C. § 553(a)(2). Here the FPC was concerned with a rate revision on the sale of public power, and its action was exempt from the notice and hearing requirements of § 553. The denial of Associated's petition to intervene and request for a hearing accordingly was not error.

Summary Judgment

While appellants contend that summary judgment should have been entered in their favor, they recognize that if the actions of the Secretary and the Commission are subject to judicial review, there are genuine issues of material facts to be resolved which preclude summary judgment.[20]

[20] The principles governing summary judgment were reviewed by this court in *Leonard* v. *BHJK Corporation*, 469 F.2d 108, 110 (D.C. Cir. 1972), where the court stated in part:

> "The movant has the burden of clearly demonstrating the absence of any genuine issues as to all of the material facts applicable under his theory of the law, and a party opposing summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the evidence. The court may not weigh or resolve issues." (citations omitted).

Accord, Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2712, (1973); *Weiss* v. *Kay Jewelry Stores Inc.*, 470 F.2d 1259, 1261-62 (D.C. Cir. 1972).

In contending that the transmission service charge was not authorized, Associated argues that the intended effect of the charge was to wipe out the agreed compensation of Associated (through credits) for transmitting SPA power for the account of SPA. On the other hand, SPA contends that the "credits" were either nonexistent or grossly over-valued and therefore illegal under the Flood Control Act.

Appellants rely on affidavits (with detailed specifications) of the Administrator of SPA and its power expert to support their claim that the "public is being required to subsidize Associated to the extent of millions of dollars a year" by reason of the "lack of value of each of the 'services' supplied by Associated to SPA". The findings and conclusions of appellants' experts are disputed in an equally detailed affidavit of Associated's power expert. The opposing affidavits present disputed issues of fact of a highly technical and complex nature which cannot be resolved through summary judgment.

Specifically, there is a factual dispute with respect to Associated's contention that it uses only 52% of the power and energy it is required to transmit over its lines.[21] Associated claims that under its contract with SPA it is obligated to transmit the remainder of the power (approx. 48%) to three power companies, six municipalities and the Bureau of Reclamation. Nevertheless, according to Associated, the Secretary by imposing the transmission service charge requires Associated to bear 100% of the cost of transmission.

The appellants point out that Associated continues to receive $278,000.00 for transmitting power to the municipalities. With respect to the three private utilities and the Bureau of Reclamation, appellants claim that

[21] A substantial part of the oral argument before the district court was devoted to this issue.

either Associated provides no transmission service or the transmission service is nominal and warrants no consideration. The extent of the transmission services performed by Associated for SPA is a question of fact material to a determination of the reasonableness of the Secretary's action.

There are genuine issues of material facts which preclude summary judgment for either appellee or appellants.

Reversed and remanded.

[Filed Dec. 16, 1974]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

Civil Action 2410-70

No. 73-1601
73-1690

ASSOCIATED ELECTRIC COOPERATIVE, INC.

v.

ROGERS C. B. MORTON, individually and as Secretary of the Interior and PETER C. KING, individually, and as Administrator of the Southwestern Power Administration

UNITED STATES OF AMERICA (Intervening Defendant)
JOHN N. NASSIKAS, ET AL., *Appellants*

Before: MacKinnon and Wilkey, Circuit Judges; Jameson,* U.S. Senior District Judge for the District of Montana.

Order

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

[Filed Jan. 8, 1973]
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2410-70

ORDER

ASSOCIATED ELECTRIC COOPERATIVE, INC., *Plaintiff*,

v.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior, (Department of the Interior, Washington, D.C.)

PETER C. KING, individually, and as Administrator of the Southwestern Power Administration, (Department of the Interior, Tulsa, Oklahoma),

JOHN N. NASSIKAS, ALBERT B. BROOKE, JR., and RUSH MOODY, JR., individually and as members of the Federal Power Commission, (Washington, D.C.), *Defendants*,

UNITED STATES OF AMERICA, *Intervening Defendant*.

Order for Summary Judgment

This cause having come to be heard on motions of the defendants for summary judgment and judgment on the pleadings, and on cross-motion of the plaintiff for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the Statements of Facts, Points and Authorities, and affidavits submitted by the parties, and having heard the argument of counsel, the Court, after due deliberation, concludes that the defendants' actions were unlawful in that:

1. The Transmission Service Charge imposed by defendants on plaintiff is not a rate revision authorized by Section 5 of the Flood Control Act of 1944 or other statute; and

2. Defendants are not authorized by law to unilaterally reduce the amounts contractually owed to plaintiff for its transmission services; and

3. Defendants' actions were arbitrary, capricious and in abuse of discretion.

It is hereby ORDERED that defendants' motions for summary judgment and judgment on the pleadings are denied in all respects, that plaintiff's motion for summary judgment is granted in all respects, and that defendants are enjoined from enforcing or collecting from plaintiff said Transmission Service Charge or any portion thereof.

Dated this 8th day of January 1973.

/s/ GEORGE L. HART, JR.
United States District Judge

[SEAL] A True Copy. James F. Davey, Clerk,

By /s/ DEAN F. MILLER
Deputy Clerk

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke

Docket No. E-7172

UNITED STATES DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

Order Confirming and Approving Rates and Charges

(Issued May 28, 1970)

The United States Department of the Interior (Interior), on behalf of the Southwestern Power Administration (SWPA), and pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887), on January 30, 1970, filed a request for the confirmation and approval of rate schedules and rates and charges contained in certain contracts applicable to the sale of power and energy by SWPA. The rate schedules proposed are F-1, IC, EE and P-2 (Revised). The contractual rates and charges proposed are those in SWPA's contract with Southwestern Electric Power Co. (Contract 14-02-001-782) and its contract with the Oklahoma Gas and Electric Company and Public Service Company of Oklahoma (Contract Ispa-356). All proposed rate schedules and contractual rates and charges are currently in effect and approved by the Commission until May 31, 1970, except Rate Schedule P-2 (Revised), which is a modification of the present Rate Schedule P-2. Interior requested that the Commission confirm and approve the rate schedules and the contractual rates and charges for a period beginning March 1, 1970 and ending February 28, 1973.

In the order in this docket issued August 15, 1968, extending approval of SWPA's rates for a temporary period, the Commission stated that:

> An overall review should be made of the operations of SWPA with the purpose in mind of modifying present contract provisions or making substitute arrangements in order that the application of the rate schedules will recover the cost of producing and transmitting electric energy including the amortization of capital investment allocated to power over a reasonable period of years, as required by the Flood Control Act of 1944.

Rate Schedule P-2 (Revised) provides for a charge of $14.40 per kilowatt per contract year for capacity plus 2.0 mills per kilowatt-hour for energy. This is the same rate currently in effect in Rate Schedule P-2. However, Rate Schedule P-2 (Revised) would include a transmission service charge, as follows:

> *Transmission Service Charge.* Where transmission service is provided beyond the SPA high voltage grid and SPA incurs additional costs therefor (such as by payment, credit, or the construction of federal facilities), the customer shall pay, in addition to the demand and energy charges, a separate Transmission Service Charge each month equal to one-twelfth of the estimated total annual cost to SPA of providing such transmission service. The amount of such total annual cost shall be computed and determined by SPA, and a memorandum copy of each such determination shall be attached to and become a part of this rate schedule.

Under the marketing contracts now in effect, the transmission service charge in Rate Schedule P-2 (Revised) would apply only to Associated Electric Cooperative, Inc. (Associated) Interior states that the annual charge to

Associated under this new rate schedule would be $2,647,100, payable in monthly installments of $220,600. This charge would recover the cost to SWPA of marketing power through facilities of Associated beyond SWPA's own 161-kv transmission lines. These annual costs consist of $1,099,000 for original 161-kv transmission facilities; $515,100 for added 161-kv facilities; $777,000 for capacity losses; and $256,000 for energy losses. The costs to SWPA for transmission services over Associated's 161-kv transmission facilities include amortization, interest, operation, maintenance, taxes, general administration expenses, replacements for 161-kv lines and substations, and capacity and energy losses.

From August 1, 1962, through fiscal year 1969, SWPA, under its contract with Associated, had sold 4,536,961,547 kwh for which it received $34,372,323. However, during this period SWPA paid Associated $30,365,000 for various contractual credits. The magnitude of these credits has greatly reduced the net revenues derived under this contract. The proposed transmission service charge in Rate Schedule P-2 (Revised) is an attempt by Interior to increase its net revenues under the Associated contract and to make the application of this rate schedule uniform for all customers.

Notice of the request for approval of the proposed rates and charges was sent to State officials and other interested parties and published in the Federal Register on February 17, 1970 (35 F.R. 3091), stating that any one desiring to make comments or suggestions for Commission consideration should submit the same on or before February 24, 1970, which date was extended to March 31, 1970, and approval of the existing rates and charges were extended to May 31, 1970, by Commission order issued February 27, 1970.

On March 31, 1970, Associated filed a petition to intervene, a brief, and an engineering report in opposition to

the approval of proposed Rate Schedule P-2 (Revised). A supplemental engineering report was filed on April 16, 1970. On May 26, 1970, Associated filed additional information, including a reply brief and supplemental engineering report. Comments were also received from customers of SWPA and Associated.

Associated petitions to intervene and also requests a full hearing and that the Commission continue the present rates for one year pending the Commission conducting a cost of service study and completion of other reviews of SWPA's power marketing operations.

On May 7, 1970, Interior filed a response to the filings made by Associated in which it urged that Associated's petition be dismissed. In support thereof Interior points out that this matter is governed by Section 5 of the Flood Control Act of 1944 and that the Commission in a similar situation in passing on SWPA's rates stated:

> "The Flood Control Act does not require or provide for hearings before the Commission in carrying out its function of passing on the rates submitted by the Secretary. The disposition and sale of power under the Flood Control Act constitutes a function of disposing of public property and as such is exempted from the requirements of the Administrative Procedure Act (5 U.S.C. 1003). The function delegated to the Commission by the Flood Control Act is that of reviewing the proposed action of the Secretary and is not the function of determining the legal rights of others. The Commission's orders under the Act are directed only to the Secretary, and it has no authority to issue orders directed to others. Thus, the petitions to intervene and the requests for hearing should be dismissed." 18 FPC 157 (1957).

It is Interior's position that the only question before the Commission is whether or not in its judgment the

action proposed by Interior is consistent with the statutory standards under which it exercises its rate-making authority, and that it would not be appropriate for the Commission in the light of its limited function as indicated above to entertain the petition to intervene, to order a hearing, to make a "cost of service study", or to supplant the Secretary's authority for carrying out SWPA's power marketing program.

In this regard we agree with Interior that Associated's petition should be dismissed.[1]

Associated recognizes SWPA's deficit operation and states it has repeatedly indicated to officials of SWPA and Interior its willingness to absorb its pro rata share of the SWPA financial deficit, and its willingness to modify its existing contractual arrangement with SWPA to the mutual benefit of both parties, provided SWPA acted accordingly in other cases. The contractual and negotiating problems which Associated emphasizes no doubt exist, however, these are matters, as we have pointed out before,[2] over which this Commission has no power or authority to adjudicate or determine, but are the responsibility of Interior and SWPA to work out with Associated.

Interior acknowledges that, in addition to its contract with Associated, it is incurring financial deficits under contracts with other customers. It states that it has identified those contractual arrangements which do not return revenues to the Government in accordance with established financial policies, and has initiated a program to negotiate changes in contract provisions or make substitute arrangements that will, to the extent possible, yield the desired financial results. We note that significant progress has already been made. SWPA has amended its contract with

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[1] See also *Kansas City Power & Light Co.* v. *Douglas McKay*, Secretary of the Interior (225 F. 2nd 924)

[2] U.S. Department of the Interior and SWPA (18 FPC 153)

Texas Power & Light Company and has entered into a new contract with Western Farmers Electric Cooperative which superseded two existing contracts under which SWPA made large annual payments for transmission service charges. Interior has also filed requests for the Commission to approve increased rates for the sale of power from the Whitney and Narrows Project, and has advised that a similar request is being filed for the Sam Rayburn project. It is our view that additional modifications in contracts are needed and should be accomplished with dispatch. However, a rate increase to Associated should not be deferred until all of SWPA's financial problems have been resolved.

At the end of fiscal year 1969, after 26 years of operations, SWPA's net revenues have failed by $30,721,083 of paying interest charges on the investment in power facilities, with the result that at the end of that year the balance to be repaid was $489,385,862, compared to the actual investment in power facilities of $458,664,779.

A review of SWPA's January 1970 Average Rate and Repayment Study indicates that SWPA must make adjustments in addition to the one affecting Associated, as is recognized by Interior, in order to fully comply with the requirements of the Flood Control Act of 1944. Interior has indicated that an additional $400,000 in annual revenues would still be needed if Rate Schedule P-2 (Revised) is approved. Associated contends that if only that amount were collected from other customers it would be paying a disproportionate share of SWPA's costs. The additional annual revenues needed by SWPA may, however, be substantially greater than $400,000. For example, firm allocations of costs have not been made for 15 of the 23 hydroelectric projects for which SWPA is the marketing agency. We note that the Comptroller General of the United States in a report to the Congress, dated May 25, 1970, suggests that the costs tentatively allocated to power for 11 of these projects should be increased a total of $81,710,000.

Interior has requested that the rate schedules and contractual rates and charges recommended in this proceeding be approved for a period of three years. However, we feel that all of the changes in SWPA rates and charges discussed above should be effected simultaneously, or as nearly so as possible. Accordingly, we are limiting the approval granted herein to a period of one year in the expectation and with the understanding that the remaining adjustments and changes will be filed in time for consideration within that period.

The Commission orders:

(A) The proposed SWPA's Rate Schedules F-1, IC, EE and P-2 (Revised) and the contractual rates and charges set forth in contracts between SWPA and Southwestern Electric Power Company (Contract 14-02-001-782) and Oklahoma Gas and Electric Company and Public Service Company of Oklahoma (Contract Ispa-356) are confirmed and approved for a period beginning June 1, 1970 and extending not later than May 31, 1971.

(B) The petition to intervene and request for hearing filed by Associated is dismissed for reasons stated above.

By the Commission.

(SEAL)

GORDON M. GRANT,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke

Docket No. E-7172

UNITED STATES DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

Order Denying Petition for Rehearing

(Issued July 24, 1970)

This order denies the petition for rehearing filed with the Federal Power Commission on June 26, 1970 by Associated Electric Cooperative, Inc. (Associated).

By order issued May 28, 1970, the Commission confirmed and approved, at the request of the Secretary of the Interior (Secretary), acting on behalf of Southwestern Power Administration (SWPA), and pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890), certain rates and charges of SWPA for the sale of electric power and energy generated at federally-owned hydroelectric projects for the period beginning June 1, 1970 and extending not later than May 31, 1971.

Associated's petition for rehearing seeks, in general, to have the Commission (1) reconsider and stay its May 28, 1970 order, (2) "reinstate" SWPA's Rate Schedule P-2, (3) grant Associated's petition to intervene and request for hearing, which were denied by our order of May 28, 1970, and (4) hear oral argument on Associated's petition for rehearing.

Associated's petition for rehearing raises no questions and makes no contentions which were not disposed of by

our order of May 28, 1970, or which having now been examined, require modification of that order.

The Commission further finds:

(1) The questions and contentions raised in the petition for rehearing filed by Associated do not require any modification of our order issued May 28, 1970.

(2) The petition for rehearing and stay of the Commission's order of May 28, 1970 should be denied.

The Commission orders:

The petition for rehearing and stay of the Commission order of May 28, 1970, in the above-entitled proceeding, filed by Associated is hereby denied.

By the Commission.

(SEAL)

GORDON M. GRANT,
Secretary.

Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1438

In the Supreme Court of the United States

OCTOBER TERM, 1975

ASSOCIATED ELECTRIC COOPERATIVE, INC., PETITIONER

v.

STANLEY K. HATHAWAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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REX E. LEE,
Assistant Attorney General,

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INDEX

Page

Opinions below 1
Jurisdiction 1
Questions presented 2
Statutes involved 2
Statement 2
Argument 8
Conclusion 12

CITATIONS

Cases:

Bi-Metallic Co. v. *Colorado*, 239 U.S. 441 11
Evans, in re, 452 F. 2d 1239, certiorari denied *sub nom. United States* v. *Evans*, 408 U.S. 930 9
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 8
Jennings v. *Mahoney*, 404 U.S. 25 11
Joint Anti-Facist Committee v. *McGrath*, 341 U.S. 123 ..... 11, 12
Lawn v. *United States*, 355 U.S. 339 11
Rural Electrification Administration v. *Central Louisiana Electric Company*, 354 F. 2d 859, certiorari denied, 385 U.S. 815 9
United States v. *City and County of San Francisco*, 310 U.S. 16 8
United States v. *Florida East Coast Railway*, 410 U.S. 224 12
United States Department of the Interior, Southwestern Power Administration, Docket No. E-7172:
33 FPC 217 6
40 FPC 291 6
Utah Power & Light Co. v. *United States*, 243 U.S. 389 8

Statutes:

Administration Procedure Act, 5 U.S.C. 553(a)(2) 11
Department of Interior Appropriation Act, 1950, 63 Stat. 767, as amended, 16 U.S.C. 825s-1 2
Flood Control Act of 1944, Section 5, 58 Stat. 890, 16 U.S.C. 825s 2

Miscellaneous:

Comptroller General's Report No. B-153294, June 18, 1965 6
92 Cong. Rec. 7186-7200 (1946) 3
109 Cong. Rec 23808-23809 (1963) 4
10 Fed. Reg. 14527 3
35 Fed. Reg. 3091 ..... 6, 12
H.R. Rep. No. 747, 84th Cong., 1st Sess. (1955) 4, 9
H.R. Conf. Rep. No. 1085, 84th Cong., 1st Sess. (1955) 4, 9
S. Rep. No. 700, 84th Cong., 1st Sess. (1955) 4

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1438

ASSOCIATED ELECTRIC COOPERATIVE, INC., PETITIONER

v.

STANLEY A. HATHAWAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 507 F.2d 1167. The order of the district court (Pet. App. 23a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1974. A petition for rehearing was denied on December 16, 1974 (Pet. App. 22a). On March 12, 1975, the Chief Justice granted an extension of time for filing a petition for a writ of certiorari to and including May 15, 1975, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a 1962 contract, under which the Southwestern Power Administration (SPA) agreed to reduce its charges for the electric power it supplied to petitioner by crediting petitioner's account for the value of certain services petitioner was to perform for SPA, barred the Secretary of the Interior from instituting a new charge to cover the cost SPA incurred in transmitting the power to petitioner.

2. Whether Congress, by appropriating funds to implement the contract between SPA and petitioner, in effect repealed the provision of the Flood Control Act, 16 U.S.C. 825s, that requires SPA to recover the cost of transmitting electric power.

3. Whether the actions of the Secretary of the Interior in proposing the rate revision, and of the Federal Power Commission in denying petitioner's petition to intervene and request for a hearing, were arbitrary, capricious, or an abuse of discretion.

STATUTES INVOLVED

Section 5 of the Flood Control Act, 58 Stat. 890, 16 U.S.C. 825s, and the pertinent provision of the Department of Interior Appropriation Act, 1950, 63 Stat. 767, as amended, 16 U.S.C. 825s-1, are set forth at Pet. 3-5.

STATEMENT

Section 5 of the Flood Control Act of 1944, 58 Stat. 890, 16 U.S.C. 825s, provides that hydroelectric power produced at certain dams owned and operated by the United States is to be delivered to the Secretary of the Interior for disposal "at the lowest possible rates to consumers consistent with sound business principles, * * * having regard to the recovery * * * of the cost of producing and

transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years."[1] The Act further provides that the Secretary is authorized to construct or acquire only such transmission facilities as may be necessary to make the hydroelectric power "available in wholesale quantities for sale on fair and reasonable terms" to facilities owned by others. Rate schedules established by the Secretary become effective upon approval by the Federal Power Commission. *Ibid.*

Following enactment of the Flood Control Act, the Secretary designated the Southwestern Power Administration (SPA) as a marketing agent for federal hydroelectric power (10 Fed. Reg. 14527; Pet. App. 4a). Initially, SPA proposed to construct an extensive transmission system, but this proposal was rejected by Congress in 1946. 92 Cong. Rec. 7186-7200 (1946). Accordingly, between 1949 and 1951 SPA contracted with private generation and transmission cooperatives to lease certain of their transmission facilities, to be constructed with funds borrowed from the Rural Electrification Administration, and to pay all costs of operation, maintenance, repair, and capital replacement, as well as amortization payments on the construction loans. SPA also agreed to purchase the entire output of certain of their steam plants, also to be constructed with Rural Electrification Administration funds,

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[1] Both the Secretary and the Federal Power Commission have interpreted the term "amortization" in the statutes as including interest, and have adopted the policy that 50 years is a "reasonable period of years" within the meaning of the statute.

and then to resell to the cooperatives whatever power they required (Pet. App. 4a-5a).[2]

Until 1954, Congress appropriated funds to meet these contractual obligations. The contracts were suspended during fiscal years 1954 and 1955 when Congress withheld appropriations pending the outcome of litigation concerning the Secretary's authority to enter into such contracts. In 1956 Congress resumed appropriations for the lease contracts. At that time the House Committee on Appropriations instructed the Secretary that the contracts should be amended to provide that the charges for the power sold to the cooperatives would be reduced by credits relating to SPA's use of the cooperatives' transmission and generation facilities and that the power would be delivered to the cooperatives' load centers at the "basic SPA rate."[3] H.R. Rep. No. 747, 84th Cong., 1st Sess., pp. 5-6 (1955). The report of the conference committee called for delivery at the basic SPA rate "if practical." H.R. Conf. Rep. No. 1085, 84th Cong., 1st Sess., p.4 (1955).

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[2]Contrary to petitioner's assertion (Pet. 18, n. 21), Congress did not express the view that these contracts were "valid and legal." While such a statement was included in the House Report on the 1956 appropriations bill (H.R. Rep. No. 747, 84th Cong., 1st Sess., p. 5 (1955)), the Senate Report expressly stated that "[t]he action of the committee is not to be considered a congressional interpretation of the legality of the contracts involved." S. Rep. No. 700, 84th Cong., 1st Sess., p. 6 (1955). Indeed, in discussing the 1964 appropriations bill, Senator Ellender, one of the conferees on the 1956 appropriations bill, indicated that in his view such an arrangement was illegal without prior congressional approval. 109 Cong. Rec. 23808-23809 (1963).

[3]"Load centers" are locations where power is reduced in voltage (usually below 25 kv) for distribution to ultimate consumers.

In 1962, when it was foreseen that SPA could no longer fulfill the power requirements of the cooperatives, the contracts were superseded by a new contract between SPA and petitioner, a master cooperative that had been formed by six Missouri generation and transmission cooperatives to consolidate their power operations and build new generation and transmission facilities (Pet. App. 6a).[4] The new contract provided that SPA would sell petitioner hydroelectric power at a specified rate, which could, however, be increased or decreased by SPA subject to approval by the Federal Power Commission.[5] If petitioner did not desire to purchase power at an increased rate, it could terminate the agreement. Provisions in earlier contracts for load-center delivery were dropped. The new contract also provided that, in return for transmitting power on behalf of SPA and for other purported services, SPA would give petitioner annual credits against the cost of the power it purchased.[6] The credits included SPA's payment to petitioner of the cost of transmitting power to petitioner over petitioner's facilities.[7]

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[4]The new contract merely suspended the prior contracts between SPA and the cooperatives; if the new contract is terminated prior to July 1, 1995, the suspended contracts will be revived (Pet. App. 7a, n.7).

[5]The rate schedule provided for a demand charge of $14.40 per kilowatt per year and an energy charge of 2 mills per kilowatt hour (Pet. App. 6a, n.6).

[6]Petitioner also agreed to provide SPA with reserve generation and to maintain and operate certain isolated SPA facilities (Pet. App. 7a). The annual credits were set at $4,140,000. It was agreed that the credits would increase to $4,655,100 after petitioner installed two additional transmission facilities.

[7]Petitioner contends that it uses only 52 percent of the power transmitted over its facilities. The court of appeals has remanded that factual question for determination by the district court (Pet. App. 20a).

In February 1965, the Federal Power Commission noted that "[SPA's] revenues have fallen far short of meeting repayment requirements" and concluded that "a primary cause of [SPA's] financial plight is the substantial payments it makes under its contract with [petitioner]" and another cooperative (33 FPC 217, 222, 224; see also 40 FPC 291, 295). In June 1965, a report of the Comptroller General to Congress stated that the credits in SPA's contract with petitioner, including those for transmission services, were "excessive and inequitable" (No. B-153294, June 18, 1965).

In July 1969, the Administrator of SPA determined that SPA had insufficient revenues to meet its operating expenses and repay the government investment with interest, as required by the Flood Control Act, and that the largest part of the loss of revenue resulted from its contract with petitioner (Pet. App. 8a). Accordingly, the Administrator prepared a revised rate schedule that included a variable charge for transmitting power beyond SPA's high voltage grid. Under the revised schedule, petitioner is required to pay the cost of transmitting the power it purchases—a cost which the SPA previously had absorbed.

The Secretary concurred in the Administrator's recommendation and submitted the revised rate schedule for confirmation and approval to the Federal Power Commission. The Commission thereupon issued a public notice of the submission and invited comments. 35 Fed. Reg. 3091. On March 31, 1970, petitioner petitioned to intervene in the proceedings and requested a full hearing, and in support thereof filed a brief and an engineering report in opposition to the proposed rate schedule (Pet. App. 27a-28a). After giving full consideration to the proposed revision, but without an evidentiary hearing, the Commission

issued an order on May 28, 1970, confirming the rate revision as consistent with the Flood Control Act (Pet. App. 25a-31a). The appropriations committees of each House of Congress were informed of the rate revision (Pet. App. 9a).

In July 1970, SPA's bill to petitioner included the new transmission service charge. Petitioner refused to pay the new charge and, instead, instituted the present action, seeking declaratory and injunctive relief (Pet. App. 9a). The district court granted summary judgment for petitioner on cross-motions for summary judgment (Pet. App. 23a-24a). The court of appeals unanimously reversed and remanded to the district court (Pet. App. 1a-21a).

The court of appeals held that since Section 5 of the Flood Control Act expressly provides that the rates imposed with respect to a sale of power must be adequate to recover the costs of both providing and transmitting the power, imposition of the transmission service charge was within the Secretary's rate-making authority (Pet. App. 14a). The court further held that the Secretary's mandate under the Act to recover the cost of transmission had not been withdrawn by any subsequent congressional appropriations or instructions or by the contract between petitioner and SPA (Pet. App. 13a-15a). Finally, the court held that the rate revision procedures followed by the Secretary and the Commission had not been arbitrary or capricious (Pet. App. 18a-19a). Since the question whether the particular transmission service charge imposed upon petitioner was reasonable involved a factual dispute over the extent to which petitioner transmitted power to other SPA customers on SPA's behalf, that question was remanded for determination by the district court (Pet. App. 21a).

ARGUMENT

The court of appeals correctly sustained the exercise of the Secretary's rate-making authority under the Flood Control Act to recover the costs incurred in transmitting as well as generating hydroelectric power. The questions presented by the petition turn largely on the peculiar nature of the 1962 contract between petitioner and SPA, under which petitioner receives credits which offset the cost of transmitting power, and the effect of specific directions of the House Appropriations Committee concerning the particular transmission lines involved in this case. There is no conflict among the courts of appeals on these issues, and they warrant no further review.

1. Petitioner contends (Pet. 15-18) that the transmission service charge imposed by the Secretary effectively cancels certain of the credits SPA contracted to provide petitioner, and that neither the Act nor the 1962 contract authorizes nullification of such contractual obligations. As the court of appeals recognized, however, the 1962 contract expressly provides that SPA can increase the price at which it sells power to petitioner, subject to approval by the Federal Power Commission. SPA's separate contractual obligation to credit petitioner for providing it with certain services is not affected by the increase in rates.

Indeed, imposition of the transmission service charge was required by the Flood Control Act. Section 5 of the Act directs the Secretary of the Interior to market hydroelectric power generated at certain reservoir projects so as to recover "the cost of producing and transmitting" such power and energy. The transmission service charge in the revised rate schedule implements that policy by recovering the cost of transmitting power. It is well established that a government agency cannot contract in derogation of its statutory powers. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 28; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 394.

Contrary to petitioner's assertion (Pet. 14), there is nothing "inequitable" about requiring petitioner to pay the cost of transmitting the power it purchases. In fact, imposition of the charge simply eliminates an inequitable preference in favor of petitioner. If SPA were to continue to absorb the cost of transmitting over petitioner's lines power that petitioner itself purchases from SPA, petitioner would enjoy a government subsidy received by no other SPA customer. As the Federal Power Commission recognized, the transmission service charge "is an attempt by Interior * * * to make the application of this rate schedule uniform for all customers" (Pet. App. 27a).

2. Petitioner nevertheless contends (Pet. 18-22) that the only permissible means of recovering transmission costs is to increase the basic rate to all customers, rather than to impose a variable transmission charge for transmission beyond the high voltage grid. In support of this contention, petitioner relies primarily upon a report of the House Appropriations Committee on the 1956 appropriations bill, which stated that contracts between SPA and the cooperatives were to provide that "power and energy will be delivered to [their] load centers * * * at the basic SPA rate." H.R. Rep. No. 747, 84th Cong., 1st Sess., p.6 (1955). But as the court of appeals noted (Pet. App. 11a, n. 10), the conference committee's report on the bill called for delivery of power at the basic SPA rate "if practical" (H.R. Conf. Rep. No. 1085, 84th Cong., 1st Sess., p. 4 (1955)), indicating that the conferees were fully mindful of the Secretary's discretion to fix rates under the Flood Control Act. In any event, instructions in committee reports that are not themselves enacted by Congress do not have the force of law. *Rural Electrification Administration* v. *Central Louisiana Electric Company*, 354 F.2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815; *In re Evans*, 452 F.2d 1239, 1245 (C.A.D.C.), certiorari denied *sub nom. United States* v. *Evans*, 408 U.S. 930.

Petitioner also relies upon the fact that the Secretary followed the Appropriation Committee's instructions by reactivating the contracts in 1956 to provide for delivery of power to the cooperatives' load centers at the basic SPA rate, and that Congress thereafter continually appropriated funds to meet these contractual obligations. But those appropriations do not reveal a congressional intent that SPA should absorb the cost of transmitting power to the cooperatives. The funds appropriated by Congress were for the purpose of meeting all costs in connection with rentals of transmission facilities, of which SPA's contractual arrangements constituted a small part. Indeed, since 1970 Congress has been advised of the imposition of the transmission service charge, but the record does not indicate that Congress or any of its committees has suggested that the charge is improper.

Unless the Secretary has authority to impose a variable transmission charge for transmission beyond the high voltage grid (and thereby to charge petitioner the cost of transmitting power it purchases), purchasers of power who are located on the high voltage grid, for whom SPA does not incur transmission costs, would perforce subsidize other purchasers, such as petitioner, for whom SPA incurs such costs. Nothing in the Flood Control Act or its subsequent legislative history requires that the Secretary establish such a subsidy policy.[8]

3. Finally, petitioner contends (Pet. 23-25) that the actions of the Secretary in proposing the rate revision, and of the Federal Power Commission in denying petitioner's petition to intervene and request for a hearing, were arbitrary, capricious, and an abuse of discretion.

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[8]Petitioner contends that the transmission service charge discriminates against customers served over non-federal lines, such as petitioner, while giving an advantage to customers who obtain their power directly from SPA's high-voltage grid. As the court of appeals noted, however, "[a] rate distinction between those companies which take their power directly from the high voltage grid of SPA and those which require delivery of power by SPA beyond SPA's high voltage grid is not unreasonable" (Pet. App. 18a).

Petitioner's allegation of a taking of property presumably rests upon the asserted unreasonableness of the charge imposed by the Secretary. But the central factual question bearing upon reasonableness, *i.e.*, the extent, if any, to which petitioner's lines are used for the transmission of power on behalf of other SPA customers, has been remanded for determination by the district court. Accordingly, petitioner's demand for just compensation is premature. Moreover, if petitioner determines after the district court's decision on remand that the costs of obtaining power from SPA will be excessive, petitioner may exercise its right to terminate the 1962 contract.

Petitioner's contention that the Secretary denied petitioner procedural due process by failing to give notice of and offer an opportunity to comment on the proposed rate revision was not raised in the court of appeals and therefore need not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. That contention is, in any event, without merit.

Petitioner was not statutorily entitled to a hearing before the Secretary, since the Administrative Procedure Act expressly exempts matters relating to agency management of public property from its rule-making procedures. 5 U.S.C. 553(a)(2). See *Bi-Metallic Co.* v. *Colorado*, 239 U.S. 441; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 167 (Frankfurter, J., concurring). Nor was there any denial of procedural due process. Petitioner had ample opportunity to comment upon the proposed rate revision before the Federal Power Comission.[9] The Commission gave notice of the proposed rate revision and invited com-

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[9]Moreover, petitioner will have an opportunity on remand to challenge the reasonableness of the transmission charge. Cf. *Jennings* v. *Mahoney*, 404 U.S. 25, 26.

ments. 35 Fed. Reg. 3091. On March 31, 1970, petitioner filed a petition to intervene, a brief, and an engineering report in opposition to approval of the rate revision. Petitioner filed a supplemental engineering report on April 16, 1970. Petitioner filed additional information on May 26, 1970. The Commission also considered comments from other SPA customers, as well as from petitioner's customers (Pet. App. 28a). The Commission was not required to go further and hold an evidentiary hearing prior to approving the proposed rate revision. *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 245-246; *Joint Anti-Fascist Committee* v. *McGrath, supra*, 341 U.S. at 167.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1975.

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[10]The Federal Power Commission is not required to hold evidentiary hearings on proposed rate revisions, notwithstanding that it has authority to do so and occasionally has done so with regard to unusually complex rate revisions (see, *e.g., Department of the Interior, Bonneville Power Administration*, FPC Docket No. E-8978).